

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 17.30.201 pertaining to )  
water quality permit and ) (WATER QUALITY)  
authorization fees )

TO: All Concerned Persons

1. On December 6, 2001, the Board of Environmental Review published a notice of public hearing on the proposed amendment of the above-stated rule at page 2361, 2001 Montana Administrative Register, issue number 23. The hearing was held on January 3, 2001.

2. The Board has amended ARM 17.30.201 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.30.201 PERMIT APPLICATION, DEGRADATION AUTHORIZATION, AND ANNUAL PERMIT FEES (1) through (7) remain the same as proposed, except for the following change in Schedule III.A shown below.

Schedule III.A Annual Fee for Individual Permits

Category	Minimum Fee <sup>(1)</sup>	Fee Per Million Gallons of Effluent per Day (MGD)
Publicly owned treatment works - major	\$2,000	\$2,500
Privately owned treatment works - major	3,000	3,000 <sup>(2)</sup>
Publicly owned treatment works - minor	1,000	2,500
Privately owned treatment works - minor	<del>750</del> <u>1,000</u>	3,000 <sup>(2)</sup>
<u>Privately owned treatment works - minor</u> <sup>(3)</sup>	<u>750</u>	<u>750</u>
Ground water, domestic wastes	750	3,000
Ground water, industrial or other wastes	1,500	3,000 <sup>(2)</sup>

<sup>(1)</sup> Per outfall, multiple storm water outfalls limited to a maximum of five outfalls.

<sup>(2)</sup> Except \$750 per MGD if effluent is noncontact cooling water.

<sup>(3)</sup> Noncontact cooling water only.

Schedule III.B through (10)(b) remain the same as proposed.

3. The following comments were received and appear with the Board's responses:

Comment No. 1: Several commentators stated opposition to any fee increase due to a variety of factors. Chief among the reasons was the economic burden on small communities and businesses and the belief that state government should not increase its number of employees at this time.

Response: The proposed fees will cover the cost of additional staff in the Department's Water Protection Bureau as well as increased program requirements imposed since the fee program went into effect in 1994. The Bureau is responsible for protecting the state's surface and ground water resources. With the current level of staffing, the Bureau is unable to perform its core responsibilities:

- issuing permits in a timely manner,
- responding to citizen complaints about permitted facilities,
- conducting compliance monitoring activities,
- reviewing discharge monitoring data,
- and inspecting facilities.

In addition to permitting activities, these fees are also used to meet the Bureau's obligation to pay its share of costs for water quality standards development as well as enforcement, legal assistance, and administration.

Permits that are not renewed in a timely manner result in the loss of hundreds of thousands of dollars in grants and loans to Montana communities for upgrades to sewage treatment facilities. Delay in issuing new permits creates construction delays for both private and community wastewater systems. Failure to respond to citizen complaints in a timely manner has resulted in citizen lawsuits against both public and private permittees. Further, federal storm water regulation requires that states begin to regulate municipal storm water discharges by 2003. Failure to implement this program may result in further legal action or EPA issued permits.

The Department has proposed to remedy this situation by increasing the Bureau's technical staff (three full-time employees [FTEs]) and support staff (one FTE). The 2001 Legislature approved the additional staff to address the permit backlog and other increased program demands identified in the preceding paragraph. Section 75-5-516, MCA, of the Montana Water Quality Act requires that the Board prescribe fees that are sufficient to cover the Board's and the Department's documented costs for reviewing and issuing permits, licenses, certifications, and other mandated activities such as inspections and monitoring. The Bureau's proposed budget was documented and approved by both executive and legislative branch oversight committees. For the past three years, revenue did not cover costs, but a previously existing account surplus made up the difference. The surplus is gone, and the program is now accumulating a deficit.

Comment No. 2: Five commentors stated that they did not have adequate time to assess economic impact due to the timing of the public notice (during the holiday season) or the short time frame of the comment period.

Response: The timing of the proposed fee rule is largely outside the control of both the Department and the Board; it is established by the Montana Administrative Procedure Act (MAPA) and the executive branch budget process. Fee rules must be in place for February billing in order to generate revenue for the current fiscal year (July 1, 2001 to June 30, 2002).

The Department's timing was determined by several factors. First, the Department did not propose a fee increase until the budget surplus was eliminated. This occurs in the current fiscal year (FY02). Second, the Department's budget, approved by the 2001 Legislature, was not finalized until May 2001. At that time, the Department began overhauling the existing fee rule. Because the proposed rule change addresses both revenue generation and simplification of the fee structure, this process took several iterations and was completed in late August. Then the Department began meeting with affected parties representing both public and privately owned facilities. Fee notices were mailed out after the Board approved the Department's request to initiate rulemaking at its November 16 meeting. The rule package was mailed to 814 permittees, interested citizens, and other potential affected parties in early December. Because fees had to be calculated for each facility, this process took almost a week to develop and distribute.

Comment No. 3: Four commentors representing municipal governments or small businesses stated that the proposed fee increases occur in the middle of the fiscal year at a time when budgets have already been set. Several of these commentors requested that the fee increase be either reduced or phased in because of the significant amount of the increases.

Response: The Board recognizes that the proposed fee increase comes in the middle of the state fiscal year. As previously discussed, the revenue generated by this increase is used to fund program operations for the current fiscal year. Without a fee increase, the program could not meet its current fiscal year revenue needs and program obligations. Because of the timing of the increase, the Department has agreed to use its enforcement discretion to not impose penalties or enforcement actions against those small communities or businesses that did not submit the full amount by the 90-day deadline. The balance would have to be paid within 180 days.

Comment No. 4: Seven commentors did not specifically oppose the fee increase but indicated that the proposed increase was too high.

Response: The proposed fee rule is based on actual program expenditure, as approved by the Legislature. The Water Quality Act requires that fees be prescribed to cover actual program expenditures (75-5-516, MCA). The Board and Department have little discretion in setting the amount of revenue generated by the fee program. Their primary discretion is how these fees are allocated among the permitted facilities.

Comment No. 5: Two commentors requested a fee waiver. Reasons cited for the wavier were:

-Some facilities are classified as inactive or abandoned mine sites and, therefore, are non-revenue generating;

-Some facilities are located within an Indian Reservation and are required to obtain an EPA-issued NPDES permit.

Response: The Water Quality Act requires that fees be collected from regulated facilities to cover the actual cost of administering the permit program. The cost of administering wastewater permits is the same for each of the facilities identified in the proposed rule whether or not they are operating or are required to hold additional permits. Reporting, monitoring, and inspection duties must still be performed by the Department for these facilities. The Department is working separately to resolve dual-permitting issues for facilities involving both state and EPA-issued permits.

Comment No. 6: One commentor objected to the fee distribution being shifted to the public utilities.

Response: In the past, the excess revenue generated from private facilities was used to subsidize public facilities. The proposed rule change attempts to match permit fees to the expenditure of Department revenue required to issue, maintain, and administer each permit type. In this proposal, privately owned treatment works will pay a higher rate per million gallons of effluent than publicly owned treatment works. The private systems will be billed at the statutory cap while the public systems remain below the maximum allowed by statute.

Comment No. 7: One commentor asked: If the permitting process had not been backlogged on the five-year renewals, would there be now a budget shortfall?

Response: The permit backlog is largely due to inadequate staffing in the Water Quality Discharge Permit Section where discharge permits are processed and administered. A backlog has existed since the early 1990s when nondegradation law changes significantly slowed the permit processing. While the backlog is steadily being addressed, it will not be

significantly improved or eliminated without additional resources. The budget shortfall is a result of not collecting adequate funds to cover the cost of issuing and administering these permits. The Department did not propose to raise permit fees during the time when the program had annual budget surpluses. However, the Department did recognize the problem and sought additional staff to address it.

Comment No. 8: A commentor asked: Will these (new) employees be utilized only for determining Total Maximum Daily Loads (TMDLs) or will they be helping with the backlog of community discharge permits?

Response: All of the proposed employees will be located in the Water Protection Bureau in the permit section. Two of the positions will be responsible for permit writing, including municipal wastewater and storm water permits. One FTE is a support position for the permit section. The other position will be used to process other water quality licenses and certifications that are currently being handled by the permitting staff. This shift in duties will allow our permit writers to focus on the permit backlog and issuance.

Comment No. 9: One commentor asked: If the new permitting schedule is approved, four FTEs are hired, and the Department catches up on its backlog, will there then be a budget surplus?

Response: A budget surplus is not expected, but if an excessive budget surplus were to develop, a fee reduction would be proposed. The Department believes that the proposed staff level is the minimum number necessary to reduce the permit backlog, issue new permits in a timely manner, and reissue permits prior to their expiration, as well as conduct other duties of the section. These other duties include inspections, enforcement, public involvement (such as hearings), and compliance and technical assistance to more than 800 permittees.

Comment No. 10: Two commentors asked if this rulemaking applies to coal bed methane facilities and the monitoring of them.

Response: This proposal applies to all types of existing and future permits administrated by the permit section of the Water Protection Bureau. Coal bed methane facilities are authorized to discharge and are monitored under either individual or general permits in the MPDES (Montana Pollutant Discharge Elimination System) program.

BOARD OF ENVIRONMENTAL REVIEW

By: Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Reviewed by:

David Rusoff  
David Rusoff, Rule Reviewer

Certified to the Secretary of State \_\_\_\_\_, 2002.